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Nos. 83-1430, 83-1683, 83-1725

In The
Supreme Court of the United States
October Term, 1983

J. BARANELLO & SONS,
Plaintiff-Petitioner,

v.

CITY OF PATERSON,
Defendant-Respondent.

CONSOLIDATED PRECAST, INC.,
Plaintiff-Cross-Petitioner,

v.

CITY OF PATERSON,
Defendant-Respondent
On the Cross-Petition.

INDEPENDENT ELECTRICAL CONSTRUCTION CO., INC.,
Plaintiff-Cross-Petitioner,

v.

CITY OF PATERSON,
Defendant-Respondent
On the Cross-Petition.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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COUNTER-STATEMENT OF THE CASE

Procedural History of the Litigation

The dispute between the respondent City of Paterson and the petitioner J. Baranello and Sons, a New York

corporation ("Baranello") and the cross-petitioners, Consolidated Precast, Inc., a Connecticut corporation ("Consolidated") and Independent Electrical Construction Co., Inc. ("Independent") began in early 1977 with the execution of five contracts between Paterson, Consolidated, Independent, Baranello, Davidson Howard and Howard Plumbing and Heating, Inc. and the Conditioning Co., Inc. for the construction of a municipal office building within the City of Paterson, New Jersey. The initial contract amounts totalled $4,841,673.00 and required completion of the structure within a fixed period of time. Arbitration was required for all contract disputes.

From the outset several factors delayed the job, including subsurface conditions and disputes over the proper method and sequence of working. Some contractors demanded arbitration against the City to litigate the cost of these delays. The City, in turn, sought to join in the arbitration all possible responsible parties, including Baranello, the general contractor.

Baranello's response was to file a complaint seeking injunctive relief in the Superior Court of New Jersey, Chancery Division in an effort to enjoin the arbitration against it. The suit was commenced in June, 1978 and judgment was rendered against Baranello shortly thereafter. Baranello filed an appeal from that judgment to the Appellate Division of the New Jersey Superior Court which appeal was decided adversely to Baranello on May 25, 1979. See *J. Baranello & Sons v. City of Paterson*, 168 N.J.Super. 502, 403 A.2d 919 (App. Div. 1979). Baranello subsequently sought certification to the New Jersey Supreme Court; this petition was denied on September 18, 1979. *J. Baranello & Sons v. City of Paterson*, 81 N.J. 340, 407 A.2d 1214 (1979).

As a direct and proximate result of the litigation commenced by Baranello no other party would arbitrate until Baranello was either joined as a party to the arbitration or excused from arbitrating. Baranello's lawsuit imposed a delay of approximately eighteen months in the commencement of the arbitration proceedings.

Twenty-three arbitration hearings were held from the period commencing in September, 1980, until May, 1981. The arbitration award was subsequently rendered and dated October 8, 1981 and signed by two arbitrators. As a result of the award, all five contractors received a total of $3,035,250.00 or approximately $2,500,000.00 more than was payable under the original contracts.

On or about October 28, 1981 complaints and orders to show cause were filed in the New Jersey Superior Court, Law Division, Passaic County by each of the five contractors naming the City as a defendant in each case. The complaints sought confirmation of the arbitrator's award. On November 13, 1981 the New Jersey Superior Court heard arguments in support of the application for confirmation and in opposition thereto and at the conclusion thereof granted summary judgment in favor of the contractors confirming each of the awards. A formal order for judgment was entered on November 23, 1981.

The City filed an appeal from the judgment of the Law Division to the Appellate Division of the Superior Court of New Jersey on November 24, 1981. On August 2, 1983 the Appellate Division of the New Jersey Superior Court reversed the judgments confirming the awards, vacated the awards and remanded the matter "for a new arbitration proceeding". *J. Baranello & Sons v. City of Paterson*, — N.J.Super. —, — A.2d —, (App. Div. 1983).

Subsequently, by order dated November 21, 1983 and filed November 28, 1983 the New Jersey Supreme Court, denied without opinion the petitions for certification of each of the contractors including Baranello and Consolidated. *J. Baranello and Sons v. City of Paterson*, — N.J. —, — A.2d — (1983).

Throughout the course of the litigation in the New Jersey State Courts, the petitioner and cross-petitioners predicated their claims for relief upon the applicability of New Jersey law and did not assert a federal question until the petition for certiorari was filed with this Court.

The matter was remanded to the American Arbitration Association for additional proceedings consistent with the decision of the Appellate Division of the New Jersey Superior Court. The same two arbitrators who rendered the award now under appeal were assigned to arbitrate the remanded proceedings. At the conclusion of the proceedings the arbitrators unanimously made a new award on or about April 16, 1984 which award substantially increased the amount of monies awarded to each of the five contractors.

Thereafter, on or about May 2, 1984 the petitioner, J. Baranello and cross-petitioner, Consolidated Precast filed verified petitions in the United States District Court for the District of New Jersey seeking to confirm the award of the arbitrators. The matters are presently returnable before the District Court on May 29, 1984.

ARGUMENT

Point I.

Certiorari should not be granted in this matter.

Petitioner-Respondent, and Cross-Petitioner now seek, after unfavorable decisions from both the Appellate Division of the Superior Court of New Jersey and the Supreme Court of New Jersey, to amend the grounds on which they appeal to include the federal question of whether the Arbitration Act, 9 U.S.C. sections 1 through 14 is applicable to this controversy.

To invoke the jurisdiction of this Court, the petitioners now attempt to introduce a federal issue which was never presented on the state level, although they had ample opportunity to do so. It is well settled that the Supreme Court will not decide a question not raised or resolved in the lower courts. *Youkaim v. Miller*, 96 S.Ct. 1399, 425 U.S. 231, 47 L.Ed. 2d 701 (1976). Moreover, on any appeal, the general rule is that an appellate court will not consider an issue not passed upon by the court below. *Singleton v. Wulff*, 96 S.Ct. 2868, 428 U.S. 106, 49 L.Ed. 2d 826 (1976) on remand 538 F.2d 811 (8th Cir. 1976). To allow petitioner ta raise this issue now would subjucate the appellate process, and would, in effect, allow for a *de novo* adjudication of the issues.

Petitioner and Cross-Petitioners place considerable reliance on this Court's decision in *Moses H. Cone Hospital v. Mercury Construction Corp.*, — U.S. —, 74 L.Ed. 2d 765, 103 S.Ct. 927 (1983), even though the holding in *Cone* has no applicability to the matters herein. In *Cone*, there was ongoing and parallel litigation between the state

and federal courts; the federal issue was *not* first entertained on appeal.

Petitioners and Cross-Petitioners attempt to justify their lack of timeliness in addressing the federal issue by alleging that the state courts ability to adjudicate a matter under the Federal Arbitration Act was only decided *after* the state appellate argument when this Court decided *Cone*. However, the applicability of the Federal Arbitration Act in a state court was not at issue in *Cone*; rather, the issue was, whether in light of the parallel litigation, should the federal court abstain until the state court had rendered a decision. There was merely dicta on the question of the applicability of the Federal Arbitration Act to state actions. Consequently, petitioner's and cross-petitioners' reliance upon the timing of the *Cone* decision is at best, dubious.

Moreover, the Federal Arbitration Act has always been applicable to this matter due to diversity in citizenship, making this an action in commerce, as defined by the Act. *Monte v. Southern Delaware County Authority*, 321 F.2d 870 (3rd Cir. 1963). Therefore, if the petitioner and cross-petitioners wished to allege the applicability of the Act, it was ripe for determination in the state court proceedings, and it was incumbent upon them to raise it at that time. Petitioner and cross-petitioners not only had the choice of a federal or state forum but also had the choice of addressing both state and federal questions in the chosen forum.

Furthermore, petitioner and cross-petitioners make no allegation as to any difference an adjudication under the Federal Act would have from the adjudication under the

state act. In actuality, Petitioner Baranello contends in its Petition for *Certiorari*, at page 3, that both statutes are similar in the applicable provisions of contract interpretation and evidence.

It therefore appears that to grant this petition for *certiorari* would result in duplicitous litigation which would ultimately not change in any way the decisions of the lower courts.

Point II.

The arbitration award should not be allowed to stand.

The opinion of the Appellate Division of the New Jersey Superior Court vacated the arbitrators' decision which improperly awarded petitioners approximately $2,500,000.00 in additional public monies. In doing so, that court merely applied the well settled principle that courts will not permit arbitrators to ignore contract provisions or rewrite agreements to suit the arbitrators subjective ideas of justice or fair dealing.

Numerous cases have enunciated the appropriate standard of judicial review of arbitration awards. Ordinarily awards will be upheld in the absence of good reason to reject them. *Order of Ry. Conductors and Brakemen v. Clinchfield R. Co.*, 407 F.2d 985, (5th Cir. 1969) *certiorari* denied 90 S.C.t 104, 396 U.S. 841, 24 L.Ed.2d 92 (1969). Judicial review is narrow, generally confined to errors which appear on the face of the award, and every intendment is indulged in favor of the award.

However, while lower courts are to give considerable deference to decisions of arbitrators, such deference is

not conclusive. *International Union of Operating Engineers, Local #450 v. Mid-Valley, Inc.*, 347 F.Supp. 1104 (D.Tex. 1972). If an arbitrator meant to decide an issue according to law but was mistaken in some palpable and material point, the award should be set aside. Arbitrator's findings of fact are conclusive unless they are arbitrary or capricious and not supported by evidence. *International Auto Sales and Service, Inc., v. General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union #270*, 311 F.Supp. 313 (D.LA, 1970).

The Appellate Division noted that while arbitrators have broad powers, "especially in the private sector", they may not disregard the terms and conditions of the contract. (A-9).* Indeed, several New Jersey labor relations cases emphasize the care arbitrators must take when dealing with public employees and employers, that their awards be guided by "pertinent statutory criteria as well as the public interest and welfare," *Kearny P.B.A. Local #21 v. Kearny*, 81 N.J. 208, 217 405 A.2d 393, 397 (1979). See also the distinctions between public and private employee arbitrations, *State v. State Troopers Fraternal Association*, 91 N.J. 464, 469, 453 A.2d 176, 179 (1982).

This is not to say a public entity ought to automatically have its way in arbitrations. However, it offers the basis for stricter scrutiny of arbitrator's awards to be paid out of the public treasury.

Petitioner and Cross-Petitioners argue that if the Appellate Division decision implies strict standards of re-

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*This notation refers to the appendix of Petitioner Baranello.

view, there may be delays in the enforcement of arbitration awards. Here the work began in 1977 and the legal wrangling continues into 1984, seven years later. A substantial portion of the delay in adjudication is directly attributable to Baranello.

The argument overlooks that a substantial delay resulted from the injunction against arbitration in connection with the Baranello suit with Paterson. It seems unfair for the Petitioner to complain about the delay which Baranello itself imposed on the process. "Judicial interference" was not something Baranello seemed to fear.

The entire process has been complicated, undoubtedly by the number of parties, complaints, counterclaims and cross-claims over a range of issues including proper workmanship, responsibilty for control, role of the architect, etc.; and the fact that six attorneys, two (and sometimes three) arbitrators and witnesses all had to coordinate schedules. Given these complexities none of the delay appears unwarranted or surprising.

The effectiveness of arbitration is threatened as much by the possibility of an irrational result as it is by the risk of delay. Unless the Appellate Division opinion is allowed to stand, any competent lawyer would have to advise his client that arbitration is swift but unsure. Attorneys would soon perceive that despite its advantages, arbitration carries a great risk of arbitrariness. When their decisions reflect disregard for the parties written intentions, arbitrators' awards ought to be vacated in order to protect the integrity of the arbitration process.

Suffice it to say that:

> To merit judicial enforcement, an arbitration award must be grounded in the terms of the applicable con-

tract. If the arbitrators position is not rationally inferable from the contract, he has exceeded his jurisdiction. . . .

In re Arbitration Between Mary and William Harris, 140 N.J.Super. 10, 15, 354 A.2d 704, 707 (App. Div. 1976).

CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the petition and cross-petitions for a writ of *certiorari* should be denied.

Date: May 21, 1984.

Respectfully submitted,

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